

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
2 WESTERN WASHINGTON REGION
3 STATE OF WASHINGTON
4

5 GEORGE LANE, MICHAEL P. SHAW AND
6 PUGET SOUND SURFACERS, INC.,

7 Petitioners,
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9 v.

10 CLALLAM COUNTY,
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12 Respondent.
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CASE No. 18-2-0006

PREHEARING ORDER

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15 This matter came before the Board in a Prehearing Conference held telephonically
16 on November 5, 2018. Petitioners George Lane, Michael P. Shaw and Puget Sound
17 Surfacers, Inc. appeared through their attorney, Dennis D. Reynolds. Respondent Clallam
18 County appeared through its attorney, David Alvarez. Board members Bill Hinkle and
19 William Roehl attended. Roehl convened the conference as the Presiding Officer.

20 The parties agreed that the Board does not have jurisdiction over those Issues set
21 out in the Amended Petition for Review that allege constitutional claims.¹ Petitioners'
22 counsel stated the issues were raised to preserve them for appeal. The parties agreed to
23 submit a stipulation so stating.²
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25 The parties further agreed to meet and discuss consolidation of the remaining issue
26 statements. As of the date of this order, revisions of the issue statements have not been
27 received. If and when such revisions are received, the Board will issue an amended
28 statement of the issues.
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32 ¹ Issues 6.12, 6.13, 6.14, 6.15, and 6.16 as alleged and numbered in the Amended Petition for Review filed October 15, 2018. Those issues are renumbered in this order as Issues 13-17, inclusive.

² Stipulation Re: Constitutional Claims and Issues, filed November 6, 2018.

1 Based on discussions at the Prehearing Conference and subsequent agreements of
2 the parties, the following order is entered:

3 4 I. ISSUES

5 The challenged action is Resolution No. 82 adopted by Clallam County on August 7,
6 2018. Legal Issues in this case are as follows:

7 8 Issue No. 1: Violations of GMA Notice and Public Participation Requirements

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10 Did the adoption process for the Update violate GMA effective and meaningful, early,
11 and continuous participation requirements set out in RCW 36.70A.035(1)(a)-(e);
12 RCW 36.70A.140; WAC 365-196-600, (1)(a)(b), (3)(a)-(c), (5); WAC 365-196-
13 600(3)(c)(4)(5)(6)(a)(b)(i) -(iv) (8); WAC 365-196-610(2)(a)(i); CCC 31.01.500; and/or
14 the County's adopted public participation plan and/or the requirements of RCW
15 36.70A.130(2) and WAC 365-196(a)((a)(b) (3)(a)(vi)) to establish a public
16 participation program for a Mandatory Update and broadly disseminate it?

17 18 Issue No. 2: Violations of GMA Requirements for Public Comment

19 Did the adoption process for the Update violate GMA provisions set out in RCW
20 36.70A.035(1)(a)-(e); RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-
21 600(1)(a)(b), (3)(a)-(c), (5)(6)(a)(b)(i)-(iv); WAC 365-196-610(2)(a)(i); CCC 31.01.500
22 and/or WAC 365-196-600(7)(8) for adequate notice, clearly advising the public of the
23 scope of review and/or process for receiving, considering and allowing public
24 comment and properly dealing with public comments as required by WAC 365-196-
25 600(8)(a)?

26 27 Issue No. 3: Coordinated Planning Mandate

28 Did the adoption process for the Update violate GMA coordinated planning
29 requirements in set out RCW 36.70A.010, RCW 36.70A.020(11) as implemented by
30 RCW 36.70A.035; RCW 36.70A.140; and/or WAC 365-190-070(1)?

31 32 Issue No. 4: Analysis of Incompatible or Conflicting Uses

Did the adoption process for the Update violate GMA regulatory requirements to
prepare an analysis to determine if commercial mining and forestry are truly
incompatible, and if so, determine which use "has the greatest long-term commercial
significance..." as specified by WAC 365-190-040(7)(B)?

1 Issue No. 5: Violations of GMA Update Standards.

2 Did the County's Update impermissibly fail to adopt changes to its comprehensive plan
3 for mineral resource lands and the implementing development regulations for mining as
4 required by the directives or requirements of RCW 36.70A.130(1),(4)(a); RCW
5 36.70A.170(2); WAC 365-196-610(1) (d)(e)(i) (iii); RCW 36.70A.131(1)(c); and/or WAC
6 365-190-170(3)(c) as to new information made available since the adoption or last
7 review and/or to otherwise ensure consistency with the GMA for its mineral resource
8 lands designations of long-terms commercial significant (RCW 36.70A.030(1)) and
9 mining development regulations?

10 Issue No. 6: Continuing Obligations

11 Did the County's Update impermissibly fail to meet GMA continuing obligation
12 requirements for the classification and designation of natural resource mineral lands of
13 long-term commercial significance set out in RCW 36.70A.020(8) and the consistency of
14 development regulations for mining as implemented by RCW 36.70A.060(1)(a); RCW
15 36.70A.131(1); RCW 36.70A.170(1)(c); RCW 36.70A.470; WAC 365-196-
16 480(1)(a); WAC 365-190-040(3); WAC 365-190-070(3) (a)-(d)(i)-(v) (e)(i)-(iii); and/or
17 WAC 365-196-610(2)(b)(ii)(B)(C).

18 Issue No. 7: Mineral Lands Designations/Maps

19 Are the County's current mineral resource lands designations, classifications and/or
20 maps (CCC 31.02.910) non-compliant with RCW 36.70A.060, RCW 36.70A.131(1),
21 RCW 36.70A.170(1)(c) and the guidelines established by RCW 36.70A.050, WAC
22 365-190-070(2)(3) (b)(c) (d) (i)-(v)(e) ((i)-(iii); and more specifically, WAC 365-190-
23 070(4)(b) (if adequate construction aggregates are available for projected needs from
24 currently designated mineral resource lands); WAC 365-190-070(4)(b) if adequate
25 mineral resources are available for projected needs from currently designated
26 mineral resource land; WAC 365-190-070(3)(b) (include those "with potential long-
27 term commercial significance for extracting...Sand, gravel and valuable metallic
28 substances"); WAC 365-190-070(3)(d)(v)(e)(i) (consider "the distance to market of
29 potential mineral resource lands" or "the ability to access needed minerals"); WAC
30 365-190-070(2) ("Counties and cities must identify and classify mineral resource
31 lands from which the extraction of minerals occurs or can be anticipated."); and/or
32 WAC 365-190-020(7) and WAC 365-196-830(3)(5) (make the regulations fit together
with DNR requirement to reclaim mining sites and to allow best management
practices).

1 Issue No. 8: Economic Development/Maintain and Enhance Natural Resources Industries/
2 Designate Adequate Mineral Resource Lands/Allow Mining

3 Are one or more of following Development Regulations inconsistent with the GMA,
4 RCW 36.70A.020 (5)(8) (economic development/ enhance and maintain natural
5 resource based industries), as implemented by RCW 36.70A.060(1)(a), RCW
6 36.70A.131(1); RCW 36.70A.170; WAC 365-190-040(3); WAC 365-190-070(3)(a);
7 WAC 365-190-610(2)(b)(ii)(B)(C): CCC 27.10.070; CCC 27.12.025(6); CCC
8 27.12.050(2); CCC 27.12.025(2) (Table 1); CCC 27.12.400 to CCC 27.12.425; CCC
9 27.12.740; CCC 27.12.740(2)(a)(b); CCC 27.12. 900 (Definition of "Major New
10 Development;"); CCC 27.12.740(RUE); CCC 27.12.215(1) (Table 5); CCC
11 27.12.315(1) (Table 6); CCC 27.12.730; CCC 27.12.710; CCC 27.12.715; CCC
12 27.12.900 (definitions); CCC 27.12.840(2)(a); and/or CCC 27.12.600 to CCC
13 27.12.615?

14 Issue No. 9: Internal Inconsistency

15 Are one or more of the following provisions of the Comprehensive Plan internally
16 inconsistent in violation of RCW 36.70A.070 and WAC 365-196-500(1): CCC
17 31.02.910 Generalized land use maps inconsistent with other maps including
18 subarea maps (CCC Chapters 31.03, 31.04, 31.05, 31.06 and 31.07); Clallam County
19 Mineral Overlay Map is not consistent with CCC 31.02.150(2)(c); CCC 33.07. 020(1)
20 and CCC 31.02.150(2)(b), Mineral Land goals inconsistent with CCC
21 31.02.140 Forest land goals (12) (inconsistent as to outright permitted resource uses
22 and primacy of forest use); and/or CCC 31.02.145 not consistent with CCC
23 31.02.150, setting a mandatory duty to consider mining once established as a
24 preferred land use worthy of protection?

25 Issue No. 10: Inconsistency of Development Regulations with Comprehensive Plan

26 Are one or more of following Development Regulations applied to mining inconsistent
27 with the Comprehensive Plan, in particular, CCC 31.02.140(9), CCC
28 31.02.150((2)(b)), CCC 31.02.150(2)(f), as required by RCW 36.70A.040(4)(d) and
29 CCC 31.01.400: CCC 27.10.070; CCC 27.12.025(6); CCC 27.12.050(2); CCC
30 27.12.025(2) (Table 1); CCC 27.12.400 to CCC 27.12.425; CCC 27.12.740; CCC
31 27.12.740(2)(a)(b); CCC 27.12. 900 (Definition of "Major New Development;"); CCC
32 27.12.740(RUE); CCC 27.12.215(1) (Table 5); CCC 27.12.315(1) (Table 6); CCC
27.12.730; CCC 27.12.710; CCC 27.12.715; CCC 27.12.900 (definitions); CCC
27.12.840(2)(a); and/or CCC 27.12.600 to CCC 27.12.615?

1 Issue No. 11: Failure to Account for Temporary Use/Qualitative Differences/ Reclamation
2 Requirements/ Best Management Practices

3 Are one or more of following Development Regulations applied to mining inconsistent
4 with GMA standards, WAC 365-190-070(4)(d), WAC 365-190-02(4), WAC 365-190-
5 020(7), WAC 365-196-830, WAC 365-190-120(2), recognizing that mining is a
6 temporary use, there are qualitative difference between critical areas and protection
7 of the public, that functions and values can be impacted on a short term basis or
8 even lost if mitigation via site reclamation is ultimately imposed and encouraging use
9 of best management practices to minimize impacts: CCC 27.10.070; CCC
10 27.12.025(6); CCC 27.12.050(2); CCC 27.12.025(2) (Table 1); CCC 27.12.400 to
11 CCC 27.12.425; CCC 27.12.740; CCC 27.12.740(2)(a)(b); CCC 27.12. 900
12 (Definition of "Major New Development; CCC 27.12.740(RUE); CCC 27.12.215(1)
13 (Table 5); CCC 27.12.315(1) (Table 6); CCC 27.12.730; CCC 27.12.710); CCC
14 27.12.715; CCC 27.12.900(definitions); CCC 27.12.840(2)(a); and/or CCC 27.12.600
15 to CCC 27.12.615?

14 Issue No. 12: Best Available Science

15 Are one or more of following Development Regulations applied to mining inconsistent
16 with GMA best available science requirements set out in RCW 36.70A.172: CCC
17 27.10.070; CCC 27.12.025(6); CCC 27.12.050(2); CCC 27.12.025(2) (Table 1); CCC
18 27.12.400 to CCC 27.12.425; CCC 27.12.740; CCC 27.12.740(2)(a)(b); CCC 27.12.
19 900 (Definition of "Major New Development"); CCC 27.12.740(RUE); CCC
20 27.12.215(1) (Table 5); CCC 27.12.315(1) (Table 6); CCC 27.12.730; CCC
21 27.12.710; CCC 27.12.715; CCC 27.12.900(definitions); CCC 27.12.840(2)(a); and/or
22 CCC 27.12.600 to CCC 27.12.615?

22 **The following issues are dismissed:**

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24 Issue No. 13: Whether sections of the Comprehensive Plan, identified above, Issue Nos. 7-
25 8, are unconstitutional under Article XI, Sec.11 of the Washington State Constitution
26 because they are in conflict with the GMA, a general law of the State?

27 Issue No. 14: Whether sections of the Development Regulation identified above, Issues
28 Nos. 8-9, violate the Washington State Constitution and/or the United States
29 Constitution substantive due process clause because they are unduly burdensome
30 and because less burdensome alternatives are available?

31 Issue No. 15: Whether one of more of the adopted Development Regulations identified
32 above violate statutory and/or constitutional nexus and proportionality standards?

Issue No. 16: Whether sections of the Development Regulations identified above fail constitutional tests for protection of property use and development because of the absence of a particularized determination that the regulation is reasonably necessary?

Issue No. 17: Whether the County violated State or Federal constitutional procedural due process protections for one or more of the failures and oversights set out in Issues Nos. 6.1-6.3, above?

Petitioners have the obligation to review these issue statements to ensure that they properly set forth the issues raised. If Petitioners object to the completeness or accuracy of these issue statements, they must file a written motion for change together with the proposed changed issue or issues in their entirety no later than seven (7) days from the date of this order.

II. SCHEDULE

The following schedule shall remain in effect unless modified in writing by subsequent order:

October 11, 2018	Petition Filed
October 18, 2018	Notice of Hearing and Preliminary Schedule
November 5, 2018	Prehearing Conference
November 13, 2018	Prehearing Order ³
November 16, 2018	Index Due (Respondent to file)
November 21, 2018	Additions to Index (Petitioners) optional
November 30, 2018	Deadline for Dispositive Motions and for Motions to Supplement the Record (proposed supplements to be attached)
December 7, 2018	Deadline for Response to Dispositive Motions or Motions to Supplement the Record
December 21, 2018	Anticipated date of Order on Motions
January 9, 2019	Deadline for Petitioners' Prehearing Brief (with exhibits)

³ WAC 242-03-545(2). Any objection to such order shall be made in writing within seven days after the date the order is dated.

January 30, 2019	Deadline for Respondent's Prehearing Brief (with exhibits)
February 13, 2019	Deadline for Petitioners' Reply Brief (optional)
February 27, 2019 9:00 a.m.	Hearing on Merits of Petition Location to be determined
April 9, 2019	Final Decision and Order Deadline

III. THE RECORD

Index –The Respondent will file its Index of all documents considered in taking the challenged actions by the date indicated in the schedule. Documents listed in the Index shall be made available to the Petitioners for review and copying, at Petitioners' expense. A party wishing to submit the record of Commissioner/Council meetings or other meetings in the Index is responsible to arrange the transcription of relevant portions at the requester's expense.

Petitioners shall promptly review the Index prepared by Respondent and notify the Respondent of additions to the index if they believe any omissions have occurred.⁴ If the Respondent agrees, it shall file an Amended Index. If there is a disagreement over whether the item should be included in the record, the proponent may file a motion to supplement the record, attaching the disputed documents. Supplementation may be permitted "if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision."⁵ **Motions to supplement should also include proposed Index numbers for the evidence sought to be included in the Index.**

Supplements to the record may come from outside the Respondent's records but must be shown to be "necessary or of substantial assistance to the board in reaching its decision." Any supplements to the record proposed must meet the standard set forth in RCW 36.70A.290(4).

⁴ WAC 242-03-510(3). Within seven days after the filing of the index, any other party may file a list of proposed additions to the index. To the extent such documents were submitted to the jurisdiction or a part of the jurisdiction's proceedings prior to the challenged action, they are presumed admissible subject to relevance. If the respondent objects to any proposed addition, the petitioner may bring a motion to supplement the record as provided in WAC 242-03-565.

⁵ RCW 36.70A.290(4).

IV. EVIDENCE

The Index to the Record lists the documents that may be introduced as exhibits but those documents do not become evidence until they are referenced in a brief and submitted to the Board as exhibits to that brief. The briefs must cite the exhibits and explain how the exhibits support the arguments in the briefs. The **exhibits should be numbered with the Index number(s) from which they are drawn** and attached in numerical order to the brief. If the Index document is long, an exhibit may be limited to a copy of the relevant portion of the Indexed document. When only portions of a document or portions of a proceeding are to be relied upon, the offering party shall adequately identify and prepare the pertinent excerpts and shall supply copies of such excerpts for attachment as exhibits to a brief.⁶

The parties **shall tab each exhibit with its Index number⁷ and provide a Table of Exhibits**. Exhibits shall be filed at the same time as hearing briefs and served on all parties electronically, unless a party lacks technical capability. It is not necessary to re-submit an exhibit that has been previously (or simultaneously, as with intervenors) submitted by you or another party, as long as it is referred to by the correct Index number. In filing with the Board, the brief shall be filed electronically without exhibits, and the original and three copies⁸ of the briefs and exhibits mailed to the Board on the same day.⁹

V. BRIEFS

Briefs shall be filed with the Board and served on the other party on the dates specified on the schedule. If no time is specified, they must be served by 5:00 p.m. **The original and three copies of your briefs and exhibits are required by the Board. The original should be single-sided and two-hole punched at the top. The three copies should be double-sided and three-hole punched at the left side. Please also file each**

⁶ WAC 242-03-(4)(b).

⁷ DO Not label your exhibits Tab 1, 2, 3 or A, B, C. **Use the Index numbers assigned to the items in the record** and place the items in numerical order.

⁸ The original should be single-sided and two-hole punched at the top. The three copies should be double-sided and three-hole punched at the left side.

⁹ WAC 242-03-240.

1 **brief electronically, in Word format (without exhibits), at western@eluhwa.gov.**

2 Exhibits should not be filed on a CD as the Board's computers do not have the capacity to
3 read them.

4 Length of Briefs – **Briefs shall be limited to 30 pages for the Petitioners'**
5 **prehearing brief, 30 pages for the Respondent's response brief, and 10 pages for**
6 **Petitioners' reply brief.** A brief of 15 pages or longer shall have a table of exhibits and a
7 table of authorities. WAC 242-03-590(3) states: "Clarity and brevity are expected to assist a
8 board in meeting its statutorily imposed time limits. A presiding officer may limit the length of
9 a brief and impose format restrictions." Documents other than exhibits shall be typewritten
10 or printed, properly captioned, signed by the appropriate person submitting the same, shall
11 include his/her address, email and telephone number, and shall be on 8 1/2 x 11 inch paper.
12 Filings of more than 200 pages (including attachments) shall be submitted in individual
13 binders labeled with the case caption and document title (e.g., "Petitioners' Prehearing
14 Brief" or "County's Response Brief") on the front cover and the spine of each binder.
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17 **VI. RULES OF PROCEDURE**

18 The Board's Rules of Practice and Procedure shall apply to the proceedings in this
19 case. The Board's Rules of Practice and Procedure may be found in the Washington
20 Administrative Code (WAC), at Chapter 242-03 WAC.¹⁰
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23 **VII. DISABILITY ACCOMMODATION**

24 Any person who requires an accommodation to participate in or attend the hearings
25 in this case should contact the Administrative Assistant for the Board at least one week in
26 advance of the scheduled hearing to arrange an appropriate accommodation.
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28 **VIII. FAILURE TO ATTEND OR PARTICIPATE**

29 A party who fails to attend or participate in any hearing or other stage of the
30 adjudicative proceedings before the Board in this case may be held in default and an order
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¹⁰ The Board's handbook, available on the website, may also be useful to the parties.

1 of default or dismissal may be entered pursuant to WAC 242-03-710.

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3 **IX. COMMUNICATION WITH THE BOARD**

4 Pursuant to RCW 34.05.455, the parties may not communicate *ex parte* with the
5 Presiding Officer or other Board members. The parties are directed to Desiree Ortiz,
6 Administrative Assistant to the Board, at (360) 664-9170, or email to
7 western@elaho.wa.gov, who will act as Board liaison and handle all procedural issues.
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9 DATED this 13th day of November 2018.

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11 _____
12 William Roehl, Presiding Officer
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